(2)

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No. 88-1187

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

ERNEST WINKLER, RAYMOND J. ASARO, FRANCIS, E. BAKER, RALPH N. CAPASSO, DAVID CLEARY, GERARD F. CONDON, LAURANCE CONTI, JAMES CUMMINS, JOHN P. DEVANEY, ROBERT DORRITIE, WILLIAM J. DOVENERO, DAVID P. DRURY, BRUCE W. ERICKSON, MICHAEL FIORILLO, HERBERT C. FISCHER, THOMAS E. FLYNN, MICHAEL P. FRISCH, HENRY W. FUHRMAN, AARON GRABER, FRANK GUSTAR HENKEL,

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ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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Appellants,

vs.

JOSEPH E. SPINNATO, individually and as Commissioner of the Fire Department of the City of New York, EDWARD I. KOCH, individually and as Mayor of the City of New York, THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Appellees.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

For well over a century, New York has required public officers to be residents of the State. Public officers of local governments have also been required to be residents of the locality by which they are employed. In 1986, amendments to the residency law were passed as a form of amnesty for certain public officers who had been violating these residency requirements. These amendments exempt certain public officers living within the State from the local residency requirements for as long as they remain at their current residency, while requiring those living outside New York State to comply with both State and local residency requirements within one year.

1. Are the constitutional rights of the public officers residing out-of-state in violation of the residency requirements abridged by this statutory scheme under

either the Equal Protection Clause or the Privileges and Immunities Clause of the U.S. Constitution?

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

MURRAY, WARREN A. NAGLE, JOHN OEHM, JAMES A. OPALECKY, ANTHONY ORSANO, ROBERT PESCE, KENNETH J. PISCOPO, RICHARD PLOUFF, MICHAEL REHBERG, WILLAIM H. RITCHIE, ROBERT G. SCHILDHORN, C. BENJAMIN STIVALA, ERIK WIENER, FRED C. ZERELLI, and others similarly situated,

Appellants,

vs.

JOSEPH E. SPINNATO, individually and as Commissioner of the Fire Department of the City of New York, EDWARD I. KOCH, individually and as Mayor of the City of New York, THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Appellees.

STATEMENT

Appellees, the Commissioner of the Fire Department of the City of New York, the Mayor of the City of New York, the Fire Department of the City of New York and the City of New York ("municipal defendants"), move to dismiss the appeal or, alternatively, to affirm the final order of the Court of Appeals of the State of New York, entered

October 20, 1988, on the grounds that the appeal is not within this Court's jurisdiction and does not present a substantial constitutional question.[1] If treated as a petition for a writ of certiorari, for the reasons set forth below, the petition should be denied.

COUNTERSTATEMENT OF THE CASE

(1)

In this action, plaintiffs, 46 individual firefighters employed by the City of New York and who live outside the State of New

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[1] 28 U.S.C. §1257, amended on June 27, 1988 to be effective 90 days later, now provides that final judgments or decrees rendered by the highest court of the State, where the validity of a state statute is drawn in question as being repugnant to the Constitution, may be reviewed by this Court only by writ of certiorari. Since the effective date of the amendment, September 25, 1988, was before the Court of Appeals issued its decision in this case on October 20, 1988, the amendment governs and an appeal to this Court does not lie. See Pub. L. 100-352, §§3, 7.

York, sought a declaration that sections 3(19) and 30(5-a) of the Public Officers Law (McKinney 1988) are unconstitutional. The Public Officers Law sets forth State and local residency requirements for public officers. The challenged sections, amendments to the residency laws, exempted certain public officers living within the State from the local residency requirements for as long as they maintain their current residence, while exempting those living outside New York State from the local and State residency requirements for one year.

The Supreme Court, Queens County (Bambrick, J.), held that the challenged amendments were constitutional and granted summary judgment to defendants. A judgment to that effect was entered on or about August 18, 1987. The Appellate Division, Second Department, by order entered December 28, 1987, modified the

judgment appealed from by adding a provision declaring that Public Officers Law §§3(1a) and 30(5-a) are constitutional as applied to the plaintiffs and, as so modified, affirmed. On October 20, 1988, the Court of Appeals, with one judge dissenting, affirmed, holding that the State of New York may constitutionally draw a distinction between firefighters who have violated only local residency requirements and those who have violated both local and State residency requirements, and that such distinction violates neither the Equal Protection Clause or the Privileges and Immunities Clause of the U.S. Constitution.

(2)

Public officers of the State of New York have been required to be residents of the State since as early as 1829. Revised Statutes of the State of New York, Part I, Ch. V, title 6, §1 (1st ed. 1829). There is

also a nearly century-old requirement that those who serve as public officers of local governments be residents of the locality as well as the State. L. 1892, c. 681, §§3 and 20.

Apart from express statutory exception, the law currently provides that:

> No person shall be capable of holding a civil office who shall not, at the time he shall be chosen thereto, ... be a citizen of the United States, a resident of the state, and if it be a local office, a resident of the political subdivision or municipal corporation of the state for which he shall be chosen ... or within which his official functions are required to be exercised .... N.Y. Public Officers Law §3(1) (McKinney 1988).

Pursuant to section 30(1)(d) of the Public Officers Law, a public office is deemed vacant when the incumbent ceases to be an inhabitant of New York State or of the political subdivision or municipal corporation of which the officer was required to be a resident when chosen.

In 1962, the Legislature liberalized the local residency requirements to permit New York City police officers, correction officers and firefighters to live outside of the five New York City counties in six nearby counties: Nassau, Suffolk, Westchester, Rockland, Putnam and Orange Counties. N.Y. Public Officers Law §§3(2), (9) and 30(4), (5). (McKinney 1988). The exemptions applicable to New York City firefighters are contained in N.Y. Public Officers Law §3(a), which provides that:

> a. Neither the provisions of this section, nor of any general, special or local law, charter, code, ordinance, resolution, rule or regulation requiring a person to be a resident of the political subdivision or municipal corporation of the State for which he shall be chosen or within which his official functions are required to be exercised, shall apply to the appointment of a paid member of the uniformed force of a paid fire department ... of an City over one million population who resides (a) in the County in which such city is located; or (b) in a county within the state contiguous to the

> county in which said City is located; or (c) in a county within the state contiguous to such city; or (d) in a county within the state which is not more than fifteen miles from said city.

Applicants for employment as New York City firefighters are notified of the residency requirements when they apply, when they accept employment, and periodically thereafter.

After it became evident that some New York City firefighters were violating the requirements of Public Officers Law §§3 and 30(5), the New York City Fire Department issued a series of orders (Order No. 41 dated April 2, 1986, and Order No. 46, dated April 11, 1986) pursuant to which all firefighters who believed themselves to be in violation of the residency laws were required to so notify the Inspector General, move into a lawful county by May 30, 1986, and have their families move into a lawful county by September 1, 1986, unless, "as a result of

special circumstances, the member legitimately resides at a domicile different from that of his or her family."

Effective July 22, 1986, the State Legislature amended Public Officers Law §§3 and 30 as a form of amnesty to residency - law violators. Specifically, the Legislature added subdivision 19 to Public Officers Law §3, and also added subdivision 5-a to Public Officers Law §30 (L. 1986, ch. 509, §1, 2). Public Officers Law §3(19) provides as follows:

> Any person who resides in this state and who is currently employed as a member of the police force, a paid member of the uniformed force of a paid fire department or department of corrections in the correctional service classification of the classified civil service, of a city of over one million population, shall be exempt from the provisions of subdivisions one, two and nine of this section upon compliance with the procedure set forth in this subdivision. Any person seeking to benefit from the exemption created by this subdivision shall notify his respective employer in

> writing of said intention within thirty days from the effective date of this subdivision and shall specify his then current residence address. The exemption created by this subdivision shall be applicable only to said actual designated residence and not to any residence that any subject currently employed member may there after establish; provided, however, that any such currently employed member who resides outside this state shall have one year from the effective date of this subdivision within which to establish residence as required pursuant to subdivisions one, two and nine of this section and comply with the notice requirements of this subdivision. Said residence shall constitute a lawful residence for all purposes notwithstanding any provision to the contrary of any general, special or local law, charter, code, ordinance, resolution, rule or regulation.

Public Officers Law §30 (5-a) contains a parallel provision.

One hundred four (104) firefighters notified the Fire Department that, as of July 22, 1986, they resided at addresses within New York State but outside the 11 lawful counties. The Fire Department was notified

by 141 firefighters that they resided in New Jersey, Pennsylvania and Connecticut as of July 22, 1986. The plaintiffs in the instant case are among this group.

(3)

The instant action was commenced with the service of a summons and complaint on behalf of 45 plaintiffs on or about December 18, 1986. The complaint alleged violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution and the Due Process Clause of Article I, Section 6 of the New York State Constitution.[2] Issue was joined with service of a verified answer dated January 7, 1987. The State of New York intervened. See Executive Law, §71.

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[2]Plaintiffs' due process claims have since been abandoned.

In March 1987, plaintiffs, by order to show cause, moved for summary judgment. Municipal defendants cross-moved to dismiss the complaint by notice of cross-motion dated April 23, 1987.

In May 1987, while these motions were pending, plaintiffs sought, by order to show cause, to amend their complaint to include claims that the challenged amendments violated the Privileges and Immunities Clause of Article IV of the United States Constitution and the Equal Protection Clause of Article I, Section 11 of the New York State Constitution. Defendants consented to this amendment.

In this action, plaintiffs challenge the amendments to the Public Officers Law on the ground that the amendments contain a distinction between two classes of residency law violators based solely upon the criterion of State residence. They challenge the

constitutionality only of the amendments, not the residency requirements per se.

OPINIONS BELOW

Supreme Court Opinion

The Supreme Court, Queens County (Bambrick, J.), held that the challenged amendments were constitutional. Therefore, the Court denied summary judgment to plaintiffs and, pursuant to CPLR 3212(b), granted summary judgment to defendants. A judgment to that effect was entered August 18, 1987.

After first observing that a strong presumption of constitutionality attaches to legislative enactments, the Court addressed plaintiffs' claims under the Privileges and Immunities Clause. The Court determined that plaintiffs had neither a fundamental right to be employed by New York City nor a fundamental right to live where they chose while being so employed. Moreover, the

Court found that residency requirements for public officers do not contravene the "national economic union" sought to be protected by the Privileges and Immunities Clause, since the work of public officers is specifically intended to benefit the citizens of the State where they are hired, trained and employed at the expense of State taxpayers.

The Court found that the New York State and United States Constitutions set forth the same standards of review to be applied to the equal protection and due process claims in this case. Applying those standards, the Court held that the challenged amendments again passed constitutional muster.

Since plaintiffs did not allege that they were a suspect class, the Court held that their classification in the challenged amendments need only be rationally based to

be constitutional. The Court found that the distinction in the amendments between resident and nonresident firefighters could have been rationally based on a desire to spare New York City a shortage of skilled and experienced firefighters, a belief that resident firefighters would feel more loyalty and identity with New York State or a belief that resident firefighters would spend their wages within the State, returning an economic benefit to the State.

The Court found plaintiffs' other contentions to be likewise without merit.

Appellate Division Opinion

134 A.D.2d 66, 523 N.Y.S.2d 530

The Appellate Division, Second Department, in an opinion by the Honorable Lawrence J. Bracken, held that Public Officers Law §§3(19) and 30(5-a) were constitutional as applied to plaintiffs. The

Court modified the judgment below to so declare.

In passing on plaintiffs' equal protection claim, the Appellate Division found no authority for the contention that plaintiffs constituted a suspect class and that the challenged amendments ought to be subjected to "strict scrutiny". Therefore, the Court looked to see whether there was a "rational basis" for the amendments.

Assuming for purposes of the appeal the validity of the original State residency requirements contained in the Public Officers Law, the Court held that the challenged amendments could not be upheld on the grounds that they sought to promote a knowledge of, or a sense of loyalty to, the community since "the distinction is between two classes of persons, none of whom reside within the community in which they are employed (New York City)". However, the

Court held that "the State may classify employees and the employees of its political subdivisions so as to encourage residence inside the State for any valid reason, including the obvious financial one". Since there was a rational basis for the amendments, justifying the preference given to firefighters who continued to reside within New York State, the amendments comported with principles of equal protection.

The Appellate Division also rejected plaintiffs' contention that the challenged amendments violated the Privileges and Immunities Clause of the United States Constitution. The Court noted that it was "overly simplistic" to suggest that the Privileges and Immunities Clause prohibited "all forms of discrimination based on state residence" and held that local public employment was not a privilege which bears on the vitality of the Nation as a single

entity. The Court acknowledged the "clear implication" of recent United States Supreme Court opinions that purely public offices might be reserved to State residents consistent with the Privileges and Immunities Clause. The Court also reasoned that, to hold otherwise, would exalt one interest protected by the Constitution, the encouragement of economic harmony between States, to the exclusion of an even more basic constitutional value, that of individual State sovereignty.

Court of Appeals Opinion

72 N.Y.2d 402, 532 N.Y.S.2d 759 (1988)

(1)

The New York Court of Appeals, one judge dissenting, affirmed. The Court held that "the State of New York may constitutionally draw a distinction between firefighters who have violated only local residency requirements and those who have

violated both local and State residency requirements."

Rejecting plaintiffs' argument based on the Privileges and Immunities Clause, the Court held that plaintiffs had no "fundamental right" protected by that Clause to be employed as New York City firefighters since public employment is not a "privilege which bear[s] upon the vitality of the Nation as a single entity" [citation omitted].

The Court likewise rejected plaintiffs claim under the Equal Protection Clause of both the Federal and State Constitutions. The Court determined that since plaintiffs are not a suspect class and there is no fundamental right to government employment for purposes of the Equal Protection Clause, the amendments must be upheld so long as they are "based upon some conceivable and legitimate State interest" [citations omitted]. Applying this test, the Court held the

State's distinction between those officers who violated both State and local residency requirements and those who violated only the local requirements was rationally based, reasoning as follows (72 NY2d at 406-407):

> The State's longstanding interest in requiring its public officers to be State residents is understandable. It is without doubt that "public employees who reside in New York are more likely, as a class, to spend their money in New York" (134 AD2d 66, 75), thereby returning an economic benefit to the society from whose public fisc the officer's salaries are paid. In addition, State residents contribute more taxes to the State and its municipalities than do nonresidents who merely work within the State. Moreover, State residency requirements are premised on the belief that out-of-state residents do not have the same loyalty and commitment to the State as in-state residents. Like all public employees, those receiving amnesty must be State residents. The State has, however, subordinated its local interest to a limited degree, to accommodate those in violation. In order to comply with the State residency requirement, out-of-state residents must move; in-state residents, obviously, need not. Because out-of-state residents are

> already required to move, there is little reason to excuse them from moving into one of the lawfully designated counties. Because, on the other hand, in-state residents need not otherwise move, they are not being required to do so for the sole purpose of moving into a lawful county. But if the move from their current in-state residence, however, they, like out-of-state residents, must do so in compliance with the local residence law. This limited accommodation to those who already satisfy the State residency requirement and, therefore, do not have to move for that purpose, is rational and does not violate equal protection.

(2)

Judge Alexander dissented. While acknowledging that a State has a legitimate interest in requiring its public officers to be State residents since State residency requirements benefit the State financially and, in the case of firefighters, encourage public employees skilled in emergency rescue services to spend more time within the State, he noted that this State interest is advanced by requiring firefighters to live in the

State, not by requiring that the firefighters live in any particular counties within the State. Also recognizing that while the lawful counties have a legitimate interest in requiring New York City firefighters to reside there, he concluded that that interest is not rationally served by imposing the local residency requirement on only some New York City firefighters. Thus, he would have sustained the constitutionality of the amendments if they required the out-of-state firefighters to move into the State or if they required all New York City firefighters to move into a lawful county. However, he found that neither the State nor the local interest was rationally served by requiring only the out-of-state firefighters to move into the lawful counties and thus violated the equal protection clauses of the Federal and State Constitutions.

ARGUMENT

PURSUANT TO 28 U.S.C. §1257(a), AS AMENDED, AN APPEAL TO THIS COURT DOES NOT LIE. THE INSTANT APPEAL SHOULD THEREFORE BE DISMISSED.

IF TREATED AS A PETITION FOR A WRIT OF CERTIORARI, THE WRIT SHOULD BE DENIED. THE NEW YORK COURT OF APPEALS PROPERLY HELD THAT SECTIONS 3(19) and 30(5-a) OF THE PUBLIC OFFICERS LAW, WHICH CREATE A DISTINCTION BETWEEN FIREFIGHTERS WHO HAVE VIOLATED ONLY LOCAL RESIDENCY REQUIREMENTS AND THOSE WHO HAVE VIOLATED BOTH LOCAL AND STATE RESIDENCY REQUIREMENTS, ARE CONSTITUTIONAL UNDER BOTH THE EQUAL PROTECTION AND PRIVILEGES AND IMMUNITIES CLAUSES OF THE U.S. CONSTITUTION. IN SO HOLDING, THE COURT OF APPEALS FOLLOWED APPLICABLE DECISIONS IN THIS COURT.

I.

Plaintiffs invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257, contending that the appeal draws into question the constitutionality of the 1986

amendments to the New York State Public Officers Law. Juris. Statement at 3. As indicated, supra, at p. 3, n. 1, the recent amendment to 28 U.S.C. §1257, which governs in the instant case, now provides for such review only by writ of certiorari. See Pub. L. 100-352. The appeal, therefore, must be dismissed. If treated as a petition for writ of certiorari, for the reasons that follow, the petition should be denied.

II.

A. **The challenged amendments to the Public Officers Law do not deny plaintiffs the equal protection of the laws.**

(1)

The Equal Protection Clauses of the United States and New York State Constitutions permit the State to exercise considerable discretion in enacting laws which affect some groups differently than others. See McGowan v. Maryland, 366 U.S.

420, 425-26 (1961); Lighthouse Shores, Inc. v. Town of Islip, supra, 41 N.Y.2d at 13. Strict scrutiny will be applied to legislative enactments only when the statutory classification interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class, for example, alienage, race - or ancestry. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 312 (1976).

No fundamental right or suspect class is involved here. This Court has explicitly held that there is "no fundamental right to government employment for purposes of the Equal Protection Clause." United Building and Construction Trades Council of Camden County v. Mayor and Council of the City of Camden, 465 U.S. 208, 219 (1984) (hereinafter "Camden"); see Massachusetts Board of Retirement v. Murgia, supra, 427 U.S. at 313. And plaintiffs, nonresident

public employees, are not a suspect class. See Massachusetts Board of Retirement v. Murgia, supra, 427 U.S. at 312; San Antonio School District v. Rodriguez, 411 U.S. 1, 28 (1973)[3] Therefore, the rational basis test, not strict scrutiny, should be applied to plaintiffs' equal protection claims. Vance v. Bradley, 440 U.S. 93, 96-97 (1970); McDonald v. Board of Election Commissioners, 394 U.S. at 806, 807 (1969).

(2)

In applying this test, one looks to see whether the distinctions drawn by the challenged amendments bear a rational

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[3]The only case plaintiffs cite for the novel proposition that public employees constitute a "suspect class" is C.D.R. Enterprises, Ltd. v. Board of Education, 412 F. Supp. 1164 (E.D.N.Y. 1976), aff'd, 429 U.S. 103 (1977) (Juris. Statement at 53-55). However, it is clear that the suspect class referred to therein is that of resident aliens, not public employees. Id. at 1168-69. It is thus wholly inapposite.

relationship to a legitimate State interest. See McDonald v. Board of Election Commissioners, supra, 394 U.S. at 809. Statutory classifications will be set aside only if no state of facts reasonably may be conceived to justify them. Id. at 808-09. Moreover, the legitimate purpose justifying a statutory provision need not be the primary purpose of the provisions. McGinnis v. Royster, 410 U.S. 263, 270 (1973); Maresca v. Cuomo, 64 N.Y.2d 242, 252, app. dism. for want of a substantial federal question, 474 U.S. 802 (1985). A court may even hypothesize the motivations of the State Legislature to discern any conceivable legitimate objective. See Weinberger v. Salfi, 422 U.S. 749, 780 (1975); McGee v. Korman, supra, 70 NY2d at 231; Maresca v. Cuomo, supra, 64 NY2d at 251.

There are three separate and independently adequate rational bases for

New York State's requirement that, while certain New York City firefighters may continue to reside outside the eleven lawful counties, all firefighters must reside in the State.

First, New York has a legitimate interest in promoting the economic welfare of the State. As properly found by the Court of Appeals, "it is without doubt that 'public employees who reside in New York are more likely, as a class, to spend their money in New York' thereby returning an economic benefit to the society from whose public fisc the officers' salaries are paid." 72 NY2d at 406. In addition, New York residents contribute more taxes to the State and its municipalities than nonresidents who merely work within the State.

Second, State residency requirements are premised on the belief that out-of-state residents do not have the same loyalty and

commitment to the State as in-state residents. State residency promotes among public officers a sense of accountability and identity with the State and its communities. It has long been recognized that public officers are empowered to exercise the sovereign power of the State for the benefit of the public. See, e.g., Foley v. Connelie, 435 U.S. 291, 297 (1978). The Legislature has deemed it preferable, therefore, that public officers be State citizens. Moreover, it has long been held that " '[e]ach State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen.' " Sugarman v. Dougall, 413 U.S. 634, 647 (1972) (quoting Boyd v. Thayer, 143 U.S. 135, 161 (1892). The Legislature is entitled to require that officers be State residents so that they may take part in its political activity and help to define the

values of that polity. See Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (States may require that only bona fide residents may vote).

Lastly, the State has a legitimate interest in promoting the welfare of its citizens. Local police officers, correction officers and firefighters are professionally trained, at the expense of the State and local governments, to protect public health and safety. And, as was recognized in Martinez v. Bynum, 461 U.S. 321, 328-29 (1983), there is a "substantial state interest in assuring that services provided for its residents are enjoyed only by residents." The Legislature could rationally conclude that requiring public officers to live within the State would increase the amount of time they spend within the State, and would therefore make them available to benefit the residents of the State in the course of their

daily lives. In the case of firefighters, who have specialized training in skills such as crowd control, resuscitative techniques and rescue operations, there is a substantial state interest in having those public officers present within the State on an ongoing basis, not just when they are on duty.

It is immaterial that each of these grounds also provides a rational basis for requiring New York City residency. Each ground is rationally related to State residency purposes as well. The Legislature is permitted to adopt State residency requirements for public officers without also requiring municipal residency. When the Legislature, in the challenged amendments, opted to forgive residency violations, the Equal Protection Clause demanded only that there be a rational basis for distinguishing between resident public officers and those residing outside the State. The Legislature

could rationally have concluded that while it was willing to give up the benefits accruing to localities and to local residents under the residency laws, it was not willing to forego those same advantages insofar as they benefit the State and its residents.

(3)

The Court of Appeals decision, upholding the validity of the challenged amendments against plaintiffs' equal protection challenge, is fully consistent with applicable decisions in this Court. This Court has explicitly held that bona fide residency requirements for public officers violate neither the right to travel nor the Equal Protection Clause of the Constitution. McCarthy v. Philadelphia Civil Service Commission, 424 U.S. 645, 645-46, 647 (1976). In McCarthy, a firefighter with the Philadelphia Fire Department lost his job when he moved to New Jersey in

contravention of a municipal regulation that required him to reside in Philadelphia. Id. at 645. This Court noted that a public agency's relationship with its own employees may justify greater control than over the citizenry at large. Id. at 646, n.6. The Court characterized plaintiff's claim as asserting "a constitutional right to be employed by the city of Philadelphia while ... living elsewhere" and held that there was "no support in our cases for such a claim." Id. at 646-47 (emphasis omitted).

The Court also noted that residency requirements for public officers do not contravene the Equal Protection Clause or the Due Process Clause of the United States Constitution. Writing in McCarthy, this Court discussed its determination in another residency case (424 U.S. at 645-46):

> The Michigan Supreme Court held that Detroit's [residency] requirement for police officers was not irrational and did not violate

> the Due Process Clause or the Equal Protection Clause of the Fourteenth Amendment. We dismissed the appeal from that judgment because no substantial federal question was presented. Detroit Police Officers Assn. v. City of Detroit, 405 US 950 (1972). We have therefore held that this kind of ordinance is not irrational. (footnote and citations omitted)

In the face of this authority, plaintiffs eschew making any claim that New York's State and local residency requirements are unconstitutional. Yet the essence of plaintiffs' claim is that they have a constitutional right to remain employed by the City of New York while living out of State. Cf. McCarthy v. Philadelphia Civil Service Commission, supra, 424 U.S. at 646-47. That contention strikes at the heart of any State residency requirement and there is no support in law for such a claim. See id. at 647. If a State does not violate the Constitution by adopting a State or local residency requirement for its public officers

in the first place, it is unclear how the challenged amendments, which merely continue the requirement of State residence for public officers, can be deemed to run afoul of Constitutional guarantees.

Plaintiffs' reliance (Juris. Statement at 46-50) on Attorney-General of New York v. Soto-Lopez, 476 U.S. 898 (1986), is misplaced. In Soto-Lopez, the plaintiffs challenged a New York statute which granted a civil service preference to veterans who had been residents of New York State at the time they entered the armed forces. A plurality of this Court struck down the provision on both "right to travel" and "equal protection" grounds. Id. at 911. The Court reasoned that the statutory classification penalized plaintiffs for having exercised their right to travel and found that each of the State's asserted interests could be fully promoted by granting bonus

credits to all qualified veterans, not just those who had resided in New York at the time of their induction. Id. at 909. Soto-Lopez thus dealt with a requirement of prior residence, not a present requirement of residency, as is involved in the instant case. Indeed, the Court, in Soto-Lopez, likened the prior residency requirement to a durational residency requirement, which warrants more careful judicial review, as opposed to a bona fide residency requirement, as is involved here. Id. at 903-04 n.3, 905. Significantly, the New York courts have since upheld another part of the civil service statute which grants a preference to veterans who are residents of New York at the time that the promotional list is established, despite a challenge by nonresidents based on the same grounds as are presented here. Woods v. City of New York, 129 Misc 2d 851 (Sup. Ct., N.Y. Co.,

1985), aff'd, 119 AD2d 469 (1st Dept. 1986), aff'd, 69 NY2d 771 (1987).

Similarly, Shapiro v. Thompson, 394 U.S. 618 (1969), affords plaintiffs no authority for their equal protection challenge (Juris. Statement at 32-34). In Shapiro, this Court struck down statutes which denied welfare benefits to persons who had not been State residents for one year prior to their application for benefits. The Court, however, has long distinguished between prior residency requirements of a given duration, and continuing, bona fide, residency requirements, such as are at issue here.[4] See McCarthy v. Philadelphia Civil Service Commission, supra, 424 U.S. at 647.

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[4] Zobel v. Williams, 457 U.S. 551 (1982), cited by plaintiffs (Juris. Statement at 34-35), is likewise inapposite. There, this Court invalidated an Alaskan statute that discriminated between established and new (Footnote Continued)

Other federal and state courts have upheld bona fide residency laws. In Lorenz v. Logue, 611 F.2d 421 (2d Cir. 1979), the Court of Appeals for the Second Circuit rejected a right to travel and equal protection challenge to a New Haven ordinance, which required that municipal employees hired after January 1, 1978 had to reside within the city limits or relocate there within six months. See also, Simien v. City of San Antonio, 809 F.2d 255 (5th Cir. 1987) (residency requirement not irrational simply because some employees were exempt); Ciechon v. City of Chicago, 634 F.2d 1055, 1059) (7th Cir. 1980) (City has important interest in disciplining employees who violate

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(Footnote Continued)
state residents in the distribution of benefits based solely on their length of state residency. That case involved distinctions between old and new state residents, not between residents and non-residents, and thus has no application here.

residency requirements); Andre v. Board of Trustees, 561 F.2d 48 (7th Cir. 1977), cert. denied, 434 U.S. 1013 (1978) (village ordinance requiring all personnel to establish residency within two years upheld); Mogle v. Sevier County School District, 540 F.2d 478 (10th Cir. 1976), cert. denied, 429 U.S. 1121 (1977) (school counselor residency requirement upheld); Ector v. City of Torrance, 10 Cal. 3d 129, 514 P.2d 433, 108 Cal. Rptr. 849 (1973), cert. denied, 415 U.S. 935 (1974) (municipal residency requirement rationally promoted legitimate state purposes); Salt Lake City Firefighters Local 1645 v. Salt Lake City, 22 Utah 2d 115, 449 P.2d 239, cert. denied, 395 U.S. 906 (1969) (City residency requirement for officers and employees upheld).

It is true that these cases specifically tested the constitutionality of local or municipal residency laws. But a local

residency requirement is, necessarily, also a requirement of State residency. See Camden, supra, 465 U.S. at 216-17. And while there may be additional rational bases to support a local residency requirement, plaintiffs have failed to demonstrate why a requirement of State residency lacks a rational basis. If the Legislature may constitutionally enact a State residency requirement in the first place, it may continue that State residency for public officers, while relieving some public officers from local residency requirements.

B. The challenged amendments to the Public Officers Law do not abridge the privileges and immunities of citizens.

(1)

Plaintiffs' challenge under the Privileges and Immunities Clause fares no better. Not all forms of discrimination against citizens of other states are constitutionally suspect pursuant to Article IV, Section 2, of the

United States Constitution.[5] Camden, supra, 465 U.S. at 218.

> Some distinctions between residents and nonresidents merely reflect the fact that this is a Nation composed of individual States, and are permitted; other distinctions are prohibited because they hinder the formation, the purpose, or the development of a single Union of those States. Only with respect to those 'privileges' and 'immunities' bearing upon the vitality of the Nation as a single entity must the State treat all citizens, resident and nonresident, equally.

Id. at 218. Baldwin v. Montana Fish and Game Commission, 436 U.S. 371, 383 (1978) (hereinafter "Baldwin").

This Court has developed a two-step inquiry to determine whether a statute impermissibly contravenes the Privileges and

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[5]Article IV, section 2, clause 1 of the United States Constitution provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Immunities Clause. Camden, supra, 465 U.S. at 218. The first step is to determine whether the benefit denied to nonresidents by the challenged statute is a "fundmanetal right." If nonresidents have no fundamental interest in the benefit, the Privileges and Immunities Clause is inapplicable. Id.; see also, Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 279 (1985) (hereinafter "Piper"). Under the second step, even if a nonresident's fundamental right is affected by a statute, the statute does not violate the Privileges and Immunities Clause if the difference in treatment between residents and nonresidents is justified by a substantial reason. Camden, supra, 465 U.S. at 222; Supreme Court of Virginia v. Friedman, 487 U.S. ___, 108 S. Ct. 2260, 101 L. Ed. 2d 56 (1988); Piper, supra, 470 U.S. at 284; see also Toomer v. Witsell, 334 U.S. 385, 396 (1948).

(2)

A nonresident of the State of New York has no fundamental right to serve as a New York City firefighter. In Camden, supra, 465 U.S. 208, plaintiffs, on the basis of the Privileges and Immunities Clause, challenged a municipal ordinance which required that 40% of the employees of contractors and subcontractors working on City construction projects be Camden residents. Holding that out-of-State workers did have a fundamental right to seek private employment across State lines in Camden under the Privileges and Immunities Clause, this Court specifically distinguished public employment, noting that "[p]ublic employment is qualitatively different from employment in the private sector" and that "there is no fundamental right to government employment for purposes of the Equal Protection Clause." 465 U.S. at 219. The Court there

strongly suggests that while private employment is a protected right, public employment is not protected for purposes of the Privileges and Immunities Clause. See also, Associated General Contractors of California, Inc. v. City and County of San Francisco, 813 F.2d 922, 943, n.43 (9th Cir. 1987).

In Piper, supra, 470 U.S. 274, this Court again indicated that a public officer would be subject to a different analysis under the Privileges and Immunities Clause than the individual who pursues a private "common calling." The Court there held that New Hampshire could not exclude nonresident lawyers from its Bar. The Court reasoned that lawyers, simply by virtue of being lawyers, are not in any sense officials in the government and are not officers of the State in the political sense. Id. at 283, n.15. This Court concluded that "[b]ecause ... a

lawyer is not an 'officer' of the State in any political sense, there is no reason for New Hampshire to exclude from its bar nonresidents." Id. at 283.

There are excellent reasons to distinguish public employment from private employment in the Privileges and Immunities Clause context. The Privileges and Immunities Clause was intended to create a national economic union. Piper, supra, 470 U.S. at 280. That ideal is furthered by the movement of not only goods across state lines, but by that of persons seeking employment in private industry. Public officers, on the other hand, have a close connection with the agencies they serve. See McCarthy v. Philadelphia Civil Service Commission, supra, 424 U.S. at 646 n.6 (1976). They are trained at the expense of State and local taxpayers. They are paid by State and local taxpayers. Their work is

specifically intended to benefit the citizenry of the State and the locality. The clear implication of Piper and Camden is that a public officer does not possess any fundamental right to pursue his calling interstate, for his calling is necessarily related to the agency he serves. This distinction between residents and nonresidents merely reflects the fact that the nation, in addition to being a "national economic union," is composed of individual and sovereign States. See Camden, supra, 465 U.S. at 218; Baldwin, supra, 436 U.S. at 383.

(3)

Even if nonresidents of the State were held to have a fundamental right to serve as public officers in New York City, plaintiffs, in order to make out their claim under the Privileges and Immunities Clause, would have to demonstrate that there is no substantial

reason for the difference in treatment between residents and nonresidents or that the discrimination bears no substantial relationship to the State's objective. Piper, supra, 470 U.S. at 284. There are, however, substantial reasons for the difference in treatment between those living outside the 11 counties but residing in the State and nonresidents and the State residency requirement is substantially related to those purposes.

As is more fully set forth supra, at 27-30, in the discussion of plaintiffs' equal protection claims, the State residency requirement is justified by New York State's interest in promoting among its public officers a sense of identity with, and accountability and commitment to, the State and its communities. The State also has an interest in seeing that its local firefighters, trained in responding to a variety of

emergency situations, will be largely present within the State simply by virtue of their residence in the State. Finally, the State may legitimately seek to ensure that the salaries paid to public officers return an economic benefit to the State, through both spending and taxes. See Camden, supra, 465 U.S. at 221 (fact that Camden is spending its funds may be considered, on remand, in evaluating whether statutory discrimination violates the Privileges and Immunities Clause); see also Hicklin v. Orbeck, 437 U.S. 518, 529 (1978). Therefore, even if plaintiffs could establish that they had a fundamental right to employment as New York City firefighters, New York State is justified in requiring that such public officers be State residents for the reasons stated above.

In sum, for all the foregoing reasons, plaintiffs have demonstrated no constitutional

infirmity in the application of the challenged amendments to them, and no substantial question warranting review by this Court.

CONCLUSION

THE APPEAL SHOULD BE DISMISSED FOR WANT OF JURISDICTION. ALTERNATIVELY, THE ORDER APPEALED FROM SHOULD BE AFFIRMED. IF THE JURISDICTIONAL STATEMENT IS TREATED AS A PETITION FOR A WRIT OF CERTIORARI, THE PETITION SHOULD BE DENIED.

Respectfully submitted,

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